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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Respondents

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO.,
Respondent

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SHELL OIL COMPANY, AMICUS CURIAE

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April 10, 1972

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BRIEF OF SHELL OIL COMPANY, AMICUS CURIAE

All parties to this case have consented in writing to the filing of this brief by Shell Oil Company, an *amicus curiae* herein. In compliance with Rule 42 of the Rules

of the Supreme Court, such written consent is being filed with the Court together with this brief.

STATEMENT OF THE CASE

Shell adopts the Statement in the Brief For The Federal Power Commission (pp. 3, 4). Shell's concern as an *amicus curiae* herein is addressed only to the second question presented in that brief and in the Brief of United and Pennzoil. That question deals with the jurisdictional status of certain pipeline facilities and particularly whether the Court below was correct in determining that status prior to an initial determination by the Federal Power Commission (FPC).

SUMMARY OF ARGUMENT

I.

Regardless of the nature of the questions that must ultimately be answered before a judgment is rendered, a suit for damages and injunctive relief by one party to a contract against another is one which is cognizable in the first instance by the Courts. The remedies sought are not available from the Federal Power Commission. This case was such a suit. The injunction sought was not against the FPC, but against United Gas Pipe Line Company (United). The Commission entered the case voluntarily as an intervenor.

Having properly assumed jurisdiction of the case and the issues therein, the question raised is whether the Court should have deferred to the FPC for its decision on the jurisdictional status of United's Green System as being either an interstate or intrastate system. This question should be considered in the light of the doctrine of pri-

mary jurisdiction, not the rule requiring exhaustion of administrative remedies.

The doctrine of primary jurisdiction, properly considered, is a guide to a court in determining whether it should refrain from exercising its jurisdiction until an agency has made an initial determination of an issue essential to the Court's judgment in the case. The need for resort to administrative judgment is the key. If the issue presents no need for agency discretion or expertise beyond a court's competence to handle in the first instance, and if the apparent lack of agency jurisdiction is reasonably clear to the court, there is no requirement to defer to initial administrative judgment. If the rule were otherwise, a serious threat to Federal court jurisdiction over cases originally cognizable therein would be presented by every claim of agency jurisdiction. No such automatic disarming of our Federal court system was intended by the Natural Gas Act.[1]

The Green System issue was decided by the Fifth Circuit on the basis of undisputed facts presented on a full record. The question was of a legal nature (intrastate or interstate commerce) customarily decided by courts. No agency discretion or expertise were required. The lack of administrative jurisdiction was reasonably apparent under the particular facts and circumstances. The Court acted within its jurisdiction in deciding the Green System to be an intrastate pipeline, without prior resort to administrative judgment.

Neither petitioner, in the Questions Presented in their petitions for certiorari or their briefs, asked for a decision

1. 52 Stat. 821-833 (1938) as amended; 15 U.S.C. §§ 717-717w.

on the merits herein of the intrastate or interstate character of the Green System. Under this Court's Rule 23, part 1(c) and Rule 40, part 1(d), this issue should not be considered on the merits herein.

II.

The eleventh hour attack on the judgment below on the basis of missing indispensable parties fails to meet the requirements of Rule 19(b) of the Federal Rules of Civil Procedure. The Rule is set out in the Appendix hereto. There has been no showing of the extent of prejudice to any particular party or group of parties. The requirements of equity and good conscience, in the application of Rule 19(b), viewed from an appellate perspective, should not favor over-turning a judgment where the challenging party waited until this time to claim his indispensability. An adequate and just judgment can be rendered in this case with the parties presently joined.

ARGUMENT

I. The Question of the Intrastate Character of the Green System Was Properly Before the Fifth Circuit.

This case was instituted as a breach of contract action seeking injunctive relief and damages. The injunctive relief sought would prevent United from reducing natural gas deliveries to LP&L in a manner inconsistent with United's contractual obligations. United's actions before the Federal Power Commission had clearly indicated their intention to effectuate such a reduction claiming FPC jurisdiction over the sales.

There were two reasons LP&L felt United's claim of FPC jurisdiction was erroneous. One was that the FPC

lacked jurisdiction to curtail direct industrial sales. The second was that the purchase at the LP&L Nine-Mile Point facility was from an intrastate pipeline system.

United's New Orleans District system, known as the "Green System", was found by the Fifth Circuit to be an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. This finding was an integral part of the Court's resolution of the contractual rights and obligations of United and LP&L.

II. Neither the Doctrine of Primary Jurisdiction Or Exhaustion of Administrative Remedies Vitiates the Holding That the Green System Is Intrastate In Character.

A. Petitioners' Reliance On *Myers*[1] Obfuscates the Real Issues of Agency And Court Jurisdiction In This Case.

United's brief (p. 19) states that a party should not be able to bypass an agency proceeding merely by claiming the agency lacks jurisdiction. This blade has two edges; however. Should a party be able to defeat the jurisdiction of a Federal Court by claiming that an administrative agency has jurisdiction of the subject matter? At the time of the Fifth Circuit's decision, the FPC had not asserted jurisdiction over the Green System.[2] The issue was presented only as a claim by United with apparent FPC staff support, a claim which they sought to establish affirmatively in the injunction proceeding. This is in sharp con-

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1. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

2. The FPC has since done so in its Opinion No. 610, issued February 9, 1972, in Docket No. CP71-89. Applications for rehearing have been filed, and action thereon is due by April 10, 1972.

trast to *Marine Engineers Beneficial Association v. Interlake Steamship Company*, 370 U.S. 173 (1962), cited by petitioners, where the NLRB had already determined, prior to the Court action, that the Association was a "labor organization" for purposes of Section 8(b) of the Labor Management Relations Act, 29 U.S.C. § 158(b).

Although there is some understandable confusion between the doctrines of primary jurisdiction and exhaustion of administrative remedies, the distinction can be best illustrated by reference to the forum where the claim is initially cognizable. *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). Where "exhaustion" applies, if the claim was initially cognizable by the agency, judicial interference will be withheld until the administrative process is complete. "Primary jurisdiction," on the other hand, is intended as a guide to a court in determining whether it should refrain from exercising its jurisdiction over a claim properly pending before it until after an agency has made an administrative determination.[3]

If the claim of LP&L in this case could not have been brought before the FPC in the first instance, the question is properly one of primary jurisdiction, not exhaustion of administrative remedies. Stated differently, if there is no adequate administrative remedy, the exhaustion doctrine is not applicable.[4] The adequacy of the administrative remedy herein is discussed below.

Professor Davis says of the doctrine of primary jurisdiction:

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3. K. C. Davis, *Administrative Law Treatise*, Vol. 3, page 2, Section 19.01.

4. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).

> ". . . The principal criterion in deciding whether the doctrine is applicable usually is not legislative intent but usually is judicial appraisal of need or lack of need for resort to administrative judgment." *Administrative Law Treatise*, Vol. 3, page 53, Section 19.09.

The Fifth Circuit herein found no need to resort to prior administrative judgment. Indeed it found, from undisputed facts, that the issue of Green System jurisdiction was a legal problem resolvable, without the need for agency expertise or discretion, on the basis of "simple flow mechanics". Its determination of "the channel of constant flow" took into account the decisions in the *Lo-Vaca*[5] case, the *Amerada*[6] case, and the *Florida Parishes*[7] case.

The *Myers*[8] case was a suit to enjoin the NLRB from holding hearings to determine whether particular conduct was an unfair labor practice. This was not a case of primary jurisdiction but rather one in which the exhaustion of administrative remedies held the key issue. In light of the *Jones & Laughlin*[9] case decided the previous year, the Board's jurisdiction was quite clear. By contrast, the lack of agency jurisdiction was apparently clear to the Court in the instant case.

Although this case was not instituted to enjoin the FPC, but to protect the contractual relationship of a buyer and

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5. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

6. *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687, rehearing denied, 380 U.S. 959 (1965).

7. *Louisiana Public Service Commission v. F.P.C.*, 359 F.2d 525 (5th Cir., 1966), cert. den. 385 U.S. 833.

8. *Myers v. Bethlehem Shipbuilding Corp.*, supra.

9. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

a seller (the FPC intervened on its own), this fact is not as important in distinguishing the *Myers* case as is the apparent clarity concerning jurisdiction over the Green System at the time of the Court's decision. In the *Florida Parishes*[10] case the Court had referred to ". . . United's purely intrastate pipeline facilities which are completely separate from its interstate system. . . ." The intrastate facilities referred to were those of the Green System. Added to this is the uncontroverted fact that no gas could flow from the Green System into United's interstate lines (see the Fifth Circuit's opinion below, slip opinion page 26). The resulting case against an ultimate holding of agency jurisdiction creates an entirely different climate for the Court's decision than was present in the *Myers* case.

In *Myers*, the Court spoke of the exclusiveness of the agency's jurisdiction and of the apparent clarity of the improvidence of the Court below. Exclusiveness is a conclusion, not a helpful criterion in seeking a solution to the problem. As to the Green System in the instant case, the critical issue is whether the FPC has *any* jurisdiction, not whether it is exclusive. The question of apparent clarity of agency jurisdiction however does help in understanding *Myers*, particularly in view of the Court's citation to its *Jones & Laughlin*[11] decision (see *Myers*, supra, 303 U.S. at 49, 52).

Unlike the *Myers* case, the Court below was faced with a question of State agency jurisdiction versus Federal agency jurisdiction. The Louisiana Public Service Com-

10. *Louisiana Public Service Commission v. F.P.C.*, supra at 527.

11. *NLRB v. Jones & Laughlin Steel Corp.*, supra.

mission has exercised jurisdiction over the Green System for many years and continues to do so. The Federal Power Commission had never claimed jurisdiction over the Green System. Under these circumstances, the clarity of agency jurisdiction weighs far more heavily toward the State agency than the Federal. If, in the instant case, the Court below had held in favor of FPC jurisdiction, one might well ask whether Louisiana could successfully assert that its state administrative remedies had not been exhausted.

In *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), the state commission had asserted jurisdiction over the rates of the gas company. While the proceeding was pending before the state commission, the gas company sought an injunction in the Federal District Court against enforcement of the state commission's orders. In upholding the injunction, the Court held that the State Commission attempted to assert a jurisdiction which it did not possess. It was clear to the Court that administrative jurisdiction was lacking.

One can easily imagine examples which without dispute would clearly lie outside the administrative jurisdiction of the FPC, and in which no court would require prior administrative action before granting judicial relief. To the Fifth Circuit, the instant question of intrastate versus interstate commerce was determinable without the requirement of prior administrative assistance. Questions of this type have fallen within the aegis of the Federal Courts since *Gibbons v. Ogden*, 9 Wheaton 1 (1824). The Fifth Circuit is competent to decide the instant question unassisted by the FPC.

The essential legal character of the Fifth Circuit's decision on the Green System is important because of the

nature of petitioners' challenge. The question decided was one of law, free of factual dispute, and free of the need for administrative discretion. The Court below did not undertake to determine that a particular project was or was not in the public convenience and necessity or that a given rate was or was not just and reasonable. No one can doubt that such determinations were committed by Congress to the initial consideration of the FPC. Expertise and administrative discretion are the warp and woof of such matters. This is not the case with regard to the Green System issue.

It is not legal expertise that supports the application of the primary jurisdictional rule. It is expertise in dealing with the factual questions and disputes that lie beyond the scope of a court's competence to handle in the first instance. This is where petitioners err in citing *F.P.C. v. Arkansas Power & Light Co.*, 330 U.S. 802 (1947). In that case no issue was raised as to FPC jurisdiction over the operations of the power company. The issues there involved the company's accounting practices and whether, as to certain principal accounts, state or federal regulations should be followed.

From the cases cited, a standard emerges which has applicability in cases involving the doctrines of primary jurisdiction and exhaustion of administrative remedies. That standard is that, given a claim cognizable by the Court in the first instance, if the lack of administrative jurisdiction is reasonably clear to the Court, and if the determination requires no administrative discretion or expertise beyond the ability of the Court to handle in the first instance, resort to prior administrative action will not be required. That standard is met by the Fifth Circuit's decision herein.

B. The Fifth Circuit's Decision On the Green System Was Based On A Complete Record.

Both petitioners complain of the incompleteness of the record before the Court below (Solicitor's brief p. 38, and United brief p. 24). They invite a comparison to the evidence before the FPC in its Docket No. CP71-89.[12] The fact is, however, that all of United's direct evidence in the FPC proceeding relative to "the channel of constant flow" in the Green System was before the Court below.[13] Of equal importance is the fact that none of that evidence is controverted.

The testimony of Mr. J. H. Echterhoff relating, *inter alia*, to gas flows in the Green System, was subjected to direct examination by counsel for United and by the General Counsel of the FPC and to cross-examination by counsel for LP&L (Tr. 72-79; App. 177-182). Complete flow diagrams of the system showing sources of supply, points of delivery, and volumes flowing to and delivered from the Green System were admitted into evidence (Tr. 32-37, 44; United's original exhibits).

Testimony of Mr. W. B. Cassin, Mr. John Nelson, Mr. Martin T. Belvin, Jr., and Mr. C. C. Barnett, all officers of United, was also admitted and cross-examined before the Court below (Tr. 11-70, 84-173; App. 143-

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12. FPC Docket No. CP71-89, *United Gas Pipe Line Company*, in which certification of United's Green System and other facilities was sought.

13. Transcript page references herein (e.g. Tr. 72) are to the transcript of the record in Case No. 16637 in the U. S. District Court, Western District of Louisiana, Monroe Division, *Louisiana Power & Light Company v. United Gas Pipe Line Company and Pennzoil United, Inc.* It is included in its entirety in the Appendix filed herein. The Appendix page references are also given (e.g. App. 177).

177, 204-238). Each dealt in part, with the operation of the Green System. In all, there were 181 pages of testimony on direct and cross-examination, and more than 50 exhibits. This record is as complete as it need be to enable the Fifth Circuit to resolve the question of Green System jurisdiction. No missing fact has been mentioned by either petitioner.

C. United's Insistence On A Section 19(b) Review Of All Jurisdictional Challenges Assumes the Adequacy Of The Remedy As Well As The Basic Fact Of Jurisdiction.

Section 19(b) of the Natural Gas Act[14] provides for circuit court review of FPC orders. There is nothing in the Act, however, to suggest that such review is the only method of deciding a question of Commission jurisdiction. The cases cited in United's brief (pp. 22, 23) offer no such holdings.

Irreparable injury is an essential ingredient to an injunction case. To suggest that LP&L should have awaited a Commission decision in Docket No. CP71-89 overlooks the nature of the relief being sought. The Commission's certificate case (FPC Docket No. CP71-89) was commenced on October 1, 1970. The hearing was not actually convened until June 7, 1971, and the record was closed on July 2, 1971. The Commission's Opinion No. 610 in the certificate case was not issued until February 9, 1972. As of April 6, 1972, the matter was still pending before the FPC on rehearing. LP&L commenced this action on March 31, 1971 to protect its interests under its contracts with United.

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14. 52 Stat. 831 (1938); 15 U.S.C. § 717r(b).

While the delay involved seriously affects the relief sought, a more critical aspect of the problem lies in petitioners' apparent assumption that the Natural Gas Act clothes the FPC with authority to provide an adequate remedy. The fact is that the Act gives the Commission neither the authority to grant injunctive relief or the power to award damages for breach of contract. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). If LP&L is to protect its contract rights, it must look to the courts, not the Commission.

The lack of an adequate administrative remedy and the absence of any prior assertion of FPC jurisdiction help in placing this case in proper perspective. The "exhaustion" rule is really out of context here. Petitioners' complaint is actually that the Court below should have allowed the FPC to determine in the first instance the jurisdiction of the Green System, presumably followed by appropriate judicial review under Section 19(b) of the Natural Gas Act. Such an application of the doctrine of primary jurisdiction calls for inquiry into the need for administrative expertise and discretion and the goal of uniformity and consistency of regulation.

Unlike cases involving determinations of justness and reasonableness or of the public convenience and necessity, the jurisdictional question in this case requires no agency discretion or expertise beyond the competence of the Court to handle initially. Being a legal question determined on the basis of undisputed fact, uniformity and consistency can well be served by initial Court determination. Indeed the precedential effect of a Court determination should enhance the desired characteristics of uniformity and consistency.

III. The Questions Presented By Both Petitioners On The Green System Issue Go Solely To Where The Initial Decision Should Be Made, Not Whether The Decision Was Correct On The Merits.

Rule 23, part 1(c) of the Rules of The Supreme Court requires that a petition for writ of certiorari contain:

> ". . . (c) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 40, part 1(d)(1) and (2) provides that briefs of an appellant or petitioner on the merits shall include:

> ". . . (d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.
>
> (2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

Inasmuch as neither petitioner sought, in the petitions for certiorari or the briefs filed herein, resolution of the Green System jurisdictional issue on the merits, argument

of this issue or the merits in the Brief For Mobile Gas Service Corporation, Et Al., Amici Curiae (pp. 41-43), is improper.

IV. There Were No Indispensable Parties Missing In The Court Below.

The Brief Amicus Curiae of Pipeline Intervenors asks this Court to reverse the holding below either (1) with regard to the curtailment jurisdiction of the FPC over direct industrial purchases from interstate pipelines, or (2) because the decision was rendered without the joinder of indispensable parties. A similar position is taken by Brooklyn Union Gas Company, an *amicus curiae*. While Shell takes no position herein concerning the curtailment issue, we take exception to this eleventh hour attack on the judgment below on the basis of missing indispensable parties.

The briefs of Pipeline Intervenors and Brooklyn Union Gas Company, *amici curiae*, rely on *Sheilds v. Barrow*, 17 How. 129 (1854), in support of their claim of missing indispensable parties. This reliance apparently ignores the changes in Rule 19 of the Federal Rules of Civil Procedure made in 1966. The new rule was upheld and interpreted by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1966) so as to eliminate the categories and ritual inherited from *Sheilds v. Barrow*, supra, and substituting the "stated pragmatic considerations"[15] of Rule 19(b). The use of the term "indispensable" in Rule 19(b) is conclusory. The pragmatic considerations of the rule will not stretch that conclusion to cover all of United's customers in this case.

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15. 390 U.S. at 107.

Rule 19(b) of the Federal Rules of Civil Procedure[16] sets out four factors to be considered in determining whether a party is indispensable:

1. the extent the judgment might prejudice him or the other parties,
2. the extent such prejudice can be lessened by protective provisions or otherwise,
3. whether a judgment rendered without such party will be adequate, and
4. whether the plaintiffs will have an adequate remedy if the action is dismissed.

The extent of prejudice to United's customers other than LP&L (of which Shell is one) is not only indirect and immeasurable but highly speculative. No offer is made to help measure the extent of such prejudice or to list all those parties affected thereby. Presumably it includes not only those who purchase gas from United but all parties served by those purchasers. As the group expands, measurement of the prejudice becomes even more speculative. The position of parties served on United's systems, the varying capacities of such systems and their locations relative to supply all add to the speculative and immeasurable character of the prejudice alleged.

As to the adequacy of the judgment below from LP&L's view, there can be no question. As to the adequacy of their remedy if the judgment is reversed, the question was discussed earlier herein.

One more matter should be mentioned with regard to Rule 19(b). Before setting out the four factors listed

16. Rule 19(b) is set out in its entirety in the Appendix hereto.

above, the rule requires that the court consider the indispensable party question in the light of "equity and good conscience": Equity would not seem to favor allowing one to sit by until after a judgment is rendered and then be given the prerogative of deciding, if the judgment was not to his liking, that he was an indispensable party. Nowhere is it alleged that those now claiming to be indispensable parties lacked knowledge of the suit while still pending in the courts below.

V. Conclusion.

The judgment of the Fifth Circuit holding that United's Green System is an intrastate pipeline system subject to the jurisdiction of the Louisiana Public Service Commission should not be reversed. That judgment should be affirmed on the basis that the Court below acted within its jurisdiction in deciding the issue.

Respectfully submitted,

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APPENDIX

Rule 19, Federal Rules of Civil Procedure

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered

in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966.